

THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY

Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021

DI2021-218

EXPLANATORY STATEMENT

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Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021

OVERVIEW OF THE DECLARATION

The *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021* is a disallowable instrument made under section 177 of the *Leases (Commercial and Retail) Act 2001* (the Leases Act).

Two previous Declarations have been made under section 177 of the Leases Act: *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020* (DI2020-92) and *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No. 2)* (DI2020-283). These instruments introduced the requirement for good faith negotiations between parties having regard to the overarching principles and leasing principles set out in National Cabinet's Code of Conduct for small to medium enterprises (SMEs), prior to a landlord terminating a commercial lease or taking adverse action against an impacted tenant for a prescribed breach. These instruments are no longer in force.

On 12 August 2021, the Chief Minister announced that the ACT would be entering into a seven-day lockdown as a result of a positive COVID-19 case, and positive wastewater detections. On 16 August 2021, this was extended until 2 September 2021.

This new Declaration re-introduces the requirement for good faith negotiations between parties with regard to the overarching principles and leasing principles set out in National Cabinet's Code of Conduct, prior to a landlord terminating a commercial lease or taking adverse action against an impacted tenant for a prescribed breach.

The new Declaration reflects that JobKeeper has now expired and can no longer be used to determine a tenant's financial hardship. This change is given effect in the new Declaration through the definition of an "impacted tenant" as a tenant who:

- (i) has suffered financial stress or hardship due to COVID-19. This is evidenced by a 30% decline in the tenant's turnover for any month during the prescribed period. In the case of not-for-profit businesses, the decline in turnover required is 15%; and
- (ii) has a turnover of less than \$50 million for the 2020-21 financial year.

The decline in turnover is determined by reference to a comparison month in 2019 or 2020. The Declaration also provides a decline in turnover test for newly established businesses.

The new Declaration operates where a tenant has been impacted financially by the COVID-19 pandemic and, as a consequence, fails to meet certain obligations (including the payment of rent) under their lease agreement. The new Declaration set outs the requirement of a landlord to negotiate in good faith with an impacted tenant before taking a prescribed action against that impacted tenant for committing a prescribed breach during the prescribed period.

Due to the recent lockdown announcement and continued outbreaks of COVID-19 – particularly in Victoria and NSW, the Government considers that the measures put in place in the previous Declarations for a good faith negotiation remain necessary and provide important safeguards in the current environment.

These measures are temporary. The prescribed period commences on 12 August 2021 and there are several provisions governing when the Declaration must expire.

The new Declaration is limited to prescribed breaches committed by the impacted tenant during the prescribed period. The prescribed period commences on 12 August 2021 and ends when the Declaration is no longer in force.

The new Declaration will not apply to new lease arrangements that have been entered into from 12 August 2021, when the ACT lockdown was announced, as parties entering new arrangements from this time would have done so aware of the business conditions they were entering.

The new Declaration also applies to any termination notice given to, or prescribed action taken against, an impacted tenant after the Declaration expires, where these actions relate to a prescribed breach by the impacted tenant during the prescribed period.

The ACT's model meets the intent of the National Code of Conduct, which recognises the importance of timely good faith negotiations between parties. It also recognises that negotiations must be conducted on a case by case basis and that there is no 'one size fits all' approach to what is appropriate in each circumstance. The National Code of Conduct recognises this and contemplates parties making alternative commercial arrangements to the Code provisions. Ultimately, negotiations should have regard to the financial position of all parties.

The requirement of a lessor to engage in good faith negotiations with an impacted tenant before taking action in response to a prescribed breach is supported by the COVID-19 Local Business Commissioner.

HUMAN RIGHTS COMPATIBILITY

The measures in the new Declaration may engage and potentially limit the right to privacy in the *Human Rights Act 2004*. There may be circumstances where the tenant who is party to a commercial lease arrangement is an individual rather than a commercial entity. Where an individual is an impacted tenant under the new Declaration, a tenant may be required to provide sufficient and accurate information (which may include personal information) to their landlord to demonstrate a loss of income.

Such information would include information to establish a tenant's financial hardship so as to ensure that the parties can engage in good faith negotiations around leasing arrangements including the possible reduction in rent, based on the extent to which the tenant has suffered a loss of turnover. Exchanging sufficient and accurate information is one of the overarching principles set out in the National Code of Conduct for SME Commercial Leasing Principles.

The requirement in the new Declaration that a lessor engages in good faith negotiations with an impacted tenant prior to the landlord being allowed to exercise their right to terminate the lease or taking adverse action for a prescribed breach has an important purpose. It ensures leases cannot be terminated without the parties having had the opportunity to discuss how they can help each other in the current climate.

By mandating 'good faith' negotiations in these circumstances, the new Declaration is designed to ensure tenants have the best chance to make it through the COVID-19 period.

Exchanging sufficient and accurate information is necessary because landlords may reasonably expect tenants to demonstrate that they are suffering financial hardship because of the economic impact of COVID-19 in the context of engaging in good faith negotiations. It also ensures that there can be a reasonably proportionate response by the landlord to the level of impact of the COVID-19 pandemic experienced by the tenant in their business capacity.

The overarching principles represent expectations that lessors and tenants should meet but are not legal obligations. Individual tenants may decide not to share information if it is not necessary for the purposes of engaging in good faith negotiations.

Thus, there is no limitation of the right to privacy because there are no legal requirements for tenants to provide information, and tenants retain control as to what information is to be shared.

CONSULTATION ON THE PROPOSED APPROACH

Members of the ACT Commercial Tenancies Administration Committee were consulted in developing the Declaration. That Committee is comprised of industry stakeholders and was first established in May 2020 to provide the Government with guidance on the implementation of the National Code of Conduct and to work with stakeholders in the commercial tenancy space. For the purposes of this Declaration, a new Committee was formed in August 2021 to take in views across a range of stakeholders.

CLAUSE NOTES

Clause 1 Name of Instrument

This clause is a formal provision setting out the name of the instrument as the *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2021* (the Declaration).

Clause 2 Commencement

This clause provides for commencement of the Declaration on the day after its notification day.

Clause 3 Expiry

This clause outlines the expiry of the Declaration on (a) the first day no COVID-19 emergency is in force, or (b) if a later date is notified by the Minister, that later date.

The note to this clause explains that the Minister may notify a later day (not later than 3 months) under s 177 (3) (b) of the Leases Act if the Minister considers that the effects of the COVID-19 pandemic justify the continued operation of the Declaration.

Clause 4 Definitions

This clause defines terms in the Declaration. The purpose of the definitions in this clause is to ensure that the measures in the Declaration are restricted to tenants who have suffered financial hardship as a result of the economic impact of the COVID-19 pandemic. The definitions also set the parameters for the types of breaches by a tenant which are prescribed for the purposes of the Declaration, as well as the period in which the prescribed breaches must occur in order to be the subject of this Declaration.

An 'impacted tenant' is a tenant under a prescribed lease who is an SME Entity and they satisfy the decline in turnover test under section 5.

Evidence of annual business turnover of less than \$50 million for the 2020-2021 financial year could be provided by an impacted tenant through their latest set of audited accounts or through other independently verified information such as Australian Tax Office information.

'Prescribed breach' is defined as (a) a failure by an impacted tenant to pay rent, outgoings or other amounts due under a prescribed lease or to operate the business during the hours required under that lease. The breaches must have occurred during the prescribed period. Prescribed breach is also defined to include (b) a breach mentioned in paragraph (a) of a lease as varied following negotiations required by previous declarations under the Act, section 177.

Under the Declaration, a 'prescribed lease' is defined as (a) a lease to which the Act applies that was entered into before 12 August 2021. This includes (b)(i) an extension of the term of a lease mentioned in paragraph (a) (original lease) made on or after 12 August 2021; (b)(ii) a renewal of lease entered into or after 12 August 2021 that is substantially on the same

terms as the original lease; and (b)(iii) a lease arising, on or after 12 August 2021, from the tenant holding over after the end of the original lease.

‘Prescribed period’ means the period beginning on 12 August 2021 and ending on the first day no COVID-19 emergency is in force, or if a later date is notified by the Minister, that later date

The note to this definition explains that if the Minister considers the effect of the COVID-19 pandemic justifies a later day, the Minister may notify a later day (not later than three months) for the expiration of the Declaration. This is in accordance with s 177(3) (b) of the Leases Act.

The definition of ‘turnover’ in relation to an impacted tenant makes it clear that turnover includes (a) internet sales of goods or services and (b) any COVID-19 business support grants from the ACT Government.

Clause 2 also contains several definitions for the purposes of this section.

‘Business’ includes a business conducted on a not-for-profit basis. This definition has been included to clarify that businesses conducted not-for-for profit entities are captured by the Declaration.

‘Corporate group’ means a corporation and all its related bodies corporate.

‘COVID-19 emergency’ forms part of the definition of when a ‘prescribed period’ under the Declaration may end. A COVID-19 emergency is (a) a state of emergency declared under the *Emergencies Act 2004*, section 156 because of the coronavirus disease 2019 (COVID-19) or (b) an emergency declared under the *Public Health Act 1997*, section 119 (including any extension or further extension) because of the coronavirus disease 2019 (COVID-19).

‘Lease to which the Act applies’ refers to s 177 (5) of the Leases Act. This provision includes leases which are prescribed under section 12 (2) (a) and (b) of the Leases Act.

‘Related body corporate’ is defined by reference to section 9 of the *Corporations Act 2001* (Cwlth).

‘SME Entity’ is defined to mean a tenant (a) who carried on business for the whole of the financial year ending 30 June 2021 and had an annual turnover for that year of less than \$50 million; or (b) who did not carry on a business for the whole of the financial year ending 30 June 2021 and whose annual turnover for the financial year ending 30 June 2022 is likely to be less than \$50 million.

Clause 3 provides that for an SME Entity, a reference to a business means (a) for a franchisee in a business - the business conducted at the premises or land under the lease, (b) for a member of a corporate group- the business of the group, or (c) for any other tenant—the business conducted by the tenant.

Clause 5 Decline in turnover test

Clause 5 of the Declaration sets out the decline in turnover test which tenants must satisfy to be an ‘impacted tenant’ as defined under clause 4.

Clause 5 provides that a tenant satisfies the decline in turnover test if (1)(a) the tenant’s turnover for any month in the prescribed period (including August 2021) (an ‘impacted month’) falls short of (i) the tenant’s turnover for a comparison month or (ii) if the tenant did not carry on business in 2019 or 2020 – an amount of turnover negotiated in good faith and agreed by the lessor and tenant (the comparison turnover), and the shortfall expressed as a percentage of the comparison turnover equals or exceeds – (1)(b)(i) for a tenant conducting a business on a not-for-profit basis – 15% or (1)(b)(ii) for any other tenant – 30%.

Clause 5 defines comparison month, for an impacted month, to mean (2)(a) the same month as the impacted month in 2019 or (2)(b) if the tenant did not carry on business in 2019 – the same month as the impacted month in 2020.

Clause 6 Meaning of good faith negotiations

Clauses 8, 9 and 10 of the Declaration impose a requirement on the lessor to engage in good faith negotiations with the impacted tenant before taking certain actions in relation to the lease.

Clause 6 explains what is meant by the term ‘good faith negotiations’. A lessor engages in good faith negotiations if, in acknowledging the financial hardship suffered by the impacted tenant because of the economic impact of the COVID-19 pandemic, they negotiate with the tenant having regard to the overarching principles and leasing principles set out in the code of conduct.

The Declaration therefore requires that lessors engage with the principles in the code of conduct. This is defined in Clause 6 as the National Code of Conduct for SME Commercial Leasing Principles agreed by National Cabinet on 7 April 2020. The code of conduct is included in schedule 1 of the instrument. Clause 6 clarifies that any reference in the code of conduct to a tenant being eligible for the Commonwealth Government’s Jobkeeper payment is to be read as a reference to the tenant being an impacted tenant under the Declaration.

Clause 7 Application

Clause 7 applies the Declaration to any termination notice given to, or prescribed action taken against, an impacted tenant by the lessor in relation to a prescribed breach during the prescribed period, including any prescribed action taken by the lessor against the tenant in relation to a prescribed breach after the day the Declaration expires.

This clause is intended to capture the possibility that a lessor may pursue action against an impacted tenant after the Declaration has ended which nevertheless relates to the impacted tenant’s prescribed breach during the prescribed period.

Clause 7 removes any doubt that nothing in the Declaration prevents a lessor from terminating or taking prescribed action against an impacted tenant in relation to a

prescribed breach if the tenant (a) agrees to the termination or action or (b) the lessor has engaged in good faith negotiations and the tenant surrenders the lease.

‘Prescribed action’ is defined in Clause 10.

Clause 8 Lessor must negotiate before giving termination notice for prescribed breaches

Clause 8 is the first of three clauses which cast a requirement on a lessor to negotiate in good faith with an impacted tenant in the circumstances specified in each clause.

Under Clause 8 a termination notice given by a lessor to an impacted tenant for a prescribed breach will be void unless the lessor has engaged in good faith negotiations with the tenant in relation to the breach. The meaning of in good faith negotiations is provided at Clause 6.

Clause 9 Existing termination notices for prescribed breaches

Clause 9 applies if a lessor has given an impacted tenant a termination notice in the pre-commencement period in relation to a prescribed breach and either the tenant contests the termination under the Act pursuant to section 122(2) or the lessor applies to the Magistrates Court for confirmation of the termination under section 124(2) of the Act.

Where clause 9 applies, it prohibits the Magistrates Court from confirming the termination unless it is satisfied that the lessor has engaged in good faith negotiations with the impacted tenant.

Clause 9 defines the pre-commencement period to mean the period beginning on the day the prescribed period started and ending the day before this instrument commences.

Clause 10 Other actions by lessor against tenant

This clause prohibits other actions or proceedings which a lessor may pursue against an impacted tenant under a prescribed lease unless the lessor has engaged in good faith negotiations with the tenant in relation to the breach. This clause reflects that a termination notice is not the only action a lessor may take in relation to a prescribed breach by an impacted tenant.

Clause 10 defines what is meant by a prescribed action. As noted in this clause, these actions must relate to a prescribed breach in the prescribed period by the impacted tenant under a prescribed lease.

Clause 11 Guidelines

This clause provides that the Minister may make guidelines in relation to the listed matters including (a) for section 5 – how a tenant’s turnover is to be worked out; (b) how good faith negotiations are to be conducted by impacted tenants and lessors; (c) how the overarching principles and leasing principles set out in the code of conduct are to be applied by impacted tenants and lessors in good faith negotiations; and (d) any other relevant matter.

A guideline issued by the Minister under this clause 11 is a notifiable instrument.

Clause 12 Previous declaration

The purpose of this clause is to provide protection to impacted tenants under previous Declarations. The *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (DI2020-92)* and *Leases (Commercial and Retail) COVID-19 Emergency Response Declaration 2020 (No 2) (DI2020-283)* (the previous declaration) will continue to apply to a prescribed breach that occurred during the period of time that the previous declaration was in force. The tenant must be an impacted tenant for the purposes of the previous declaration.

This clause provides that the repeal or expiry of a previous declaration does not affect any right, remedy, protection or requirement arising in relation to a prescribed breach under the previous declaration; or affect any negotiation or agreement started or completed under, or in accordance with, the previous declaration.

Schedule 1

Schedule 1 contains the mandatory code of conduct (the National Code of Conduct) for small to medium enterprises (SMEs) commercial leasing principles during the COVID-19 pandemic as announced by the Prime Minister on 7 April 2020.

The National Code of Conduct applies to impacted tenants that are SME entities and suffering financial stress or hardship as a result of the COVID-19 pandemic.